In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1629

NATHANIEL WARDELL EDWARDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner, together with a co-defendant named Pegram, was convicted of conspiracy to operate an illegal distillery in violation of 26 U.S.C. 5601 and 5681 (Count I). He was also convicted on two counts charging substantive violations of the federal liquor laws, 26 U.S.C. 5686 (Counts IV and V).[1] Petitioner was sentenced to two years' imprisonment on Count I with eligibility for parole at such time as the Board of Parole may determine (18 U.S.C. 4208(a)(2)). The district court suspended imposition of sentence on the remaining

[1] Co-defendant McCullough failed to appear for trial and his case was severed. Co-defendant Polk was acquitted on all counts.

counts and placed petitioner on probation for a period of five years to commence upon his release from imprisonment (Tr. 213–214).[2] The court of appeals affirmed *per curiam* (Pet. App. A).

The evidence showed that on April 2, 1970, at approximately 8:00 p.m., petitioner and two co-defendants were openly transferring fourteen 100-pound bags of sugar from a disabled car to a truck in a parking lot in Nashville, Tennessee. Local officers Behaylo and Pike, on a routine patrol, observed the activity and stopped to investigate. At the hearing on petitioner's motion to suppress, officer Behaylo testified that he had recognized two of the men in the parking lot, Pegram and Polk, both of whom he knew to have been "active in the liquor business, * * * either transporting it, possessing it or manufacturing it * * *" (Tr. 23). The three men claimed they were getting the sugar for a baker, who, following a telephone call from one of the defendants, came to the parking lot and told the officer that he did not know the men and that they had no order from him for sugar (Tr. 14). The officer then detained the three men and notified the federal authorities, who arrived within an hour (Tr. 11, 15–16). When the federal agents arrived, they saw in the open trunk of the disabled automobile cracked corn, spilled sugar, and boots that had the odor of fermented mash (Tr. 19–20, 104–105, 113). Petitioner and his companions were thereupon arrested by the federal agents (Tr. 16). This incident

[2] "Tr." refers to the transcript of trial proceedings in this case.

formed the basis for one of the substantive charges (Count IV) of which petitioner was convicted.

Some three weeks later, on April 23, 1970, Treasury agents discovered a still site allegedly operated by petitioner and his co-defendants on an outlying tenant-farm (Tr. 113–114).[3] Surveillance conducted during the following week showed that the site was visited by petitioner (who apparently was then out on bail) and two of his co-defendants. Based on these and other observations made by agents, a search warrant was obtained, and, on May 1, 1970, the site was raided. (Tr. 105–109, 116–123, 129–134.) Two 1,000-gallon pot stills, 1,500 gallons of mash, and 90 gallons of nontax-paid whiskey were located at the site (Tr. 106).

Petitioner's sole contention is that the evidence relating to the sugar-transfer incident was the product of an illegal arrest and should have been suppressed at trial. The record, however, provides ample support for the conclusion that there was no arrest prior to the arrival of the federal agents, that if there was an arrest it was lawful, and that if there was an unlawful arrest the evidence was not a product of it.

Officer Behaylo testified that he did not place the men under arrest (Tr. 11) but rather "asked them if they would wait and they said that they would" (Tr. 16). He did not tell them they could not leave (Tr. 15, 22). The defense offered no evidence to show that

[3] The tenant, a government witness, had rented a house and outbuilding on the farm in November 1969 to a man he knew only as "George". Subsequently, he saw both "George" and petitioner at the site, and on one occasion petitioner had paid the monthly rent due on the buildings. (Tr. 68–70.)

petitioner understood the officer's question to be a restraint on his freedom. See *Terry* v. *Ohio,* 392 U.S. 1, 16. Even assuming that in these circumstances there can be said to have been an arrest, the record shows that officer Behaylo had probable cause to believe that an offense was being committed in his presence. He observed the men, two of whom he knew to be involved in the illegal liquor business, transferring from a car to a truck a large amount of sugar [4] during the evening hours. And if this were not enough, the officer's judgment that the sugar was being used for illegal whiskey (Tr. 20) was fortified when the baker to whom the suspects supposedly were to deliver the sugar stated that he neither knew the men nor ordered sugar from them (Tr. 14).

Finally, most of officer Behaylo's testimony concerned observations made by him before he even approached the men or while approaching them "for purposes of investigating possibly criminal behavior." *Terry* v. *Ohio, supra,* 392 U.S. at 22. Even if he lacked probable cause for an arrest, he was not required "to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams* v. *Williams,* No. 70-283, decided June 12, 1972, slip opinion p. 2.[5]

[4] The officer testified: "Well, it is uncommon, you know, to see somebody with this much sugar" (Tr. 99).

[5] A federal agent testified concerning the cracked corn, spilled sugar, and boots seen in the car (Tr. 104–105). The court of appeals properly characterized this as *de minimis* under the circumstances, and concluded that any error in admitting the testimony was harmless beyond a reasonable doubt (Pet. App. A).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

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